THE MISPLACED RELIANCE ON DEFAULT RULES IN INTERNATIONAL SALES CONTRACTS

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I. INTRODUCTION

I am honored to participate in this tribute to Professor Harry Flechtner. It is fair to say that over the last two decades Harry has been the preeminent American scholar on the United Nations Convention on Contracts for the International Sale of Goods. To have made such an important mark on such an important area of the law is a level of accomplishment that few can hope to achieve. Harry's teaching (he has earned every teaching award possible) and his indefatigable work on the Vis Moot Court will be sorely missed. I expect, though, we can continue to look forward to more scholarly contributions from him for years to come.

As the United Nations Convention on Contracts for the International Sale of Goods ("CISG")[1] has reached middle age, as the organizers of this conference suggest, it may be time to see what lessons we have learned during the CISG's period of growth and development. In this Article, I suggest one lesson is that we may get lazy and therefore not expressly resolve some issues in the agreement that, left unresolved, may cause parties unnecessary litigation or arbitration. If we are thoughtful enough to consider a choice of law and a choice of court or arbitration clause, we might also address some of the issues that arise from the default terms that would otherwise apply.

I appreciate my suggestion is aspirational in what it may require of lawyers drafting agreements. It may be that any proposal for custom contracting may be an unrealistic expectation for the bulk of transactions governed by the CISG, particularly when one of the functions of the CISG is

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[1] United Nations Convention on Contracts for the International Sale of Goods, Apr. 1, 1980, S. Treaty Doc. No. 98-99, 1489 U.N.T.S 25567, https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg [hereinafter CISG].

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to provide a set of default rules that are intended to allow parties to avoid the fuss of trying to customize every transaction. For the majority of small generic transactions, the default rules of the CISG probably serve this function well. The possible pitfalls on relying on the default rules of the CISG for more complicated transactions, though, may justify the effort to contract around some of these rules.

Contracting parties, and academics that write about this, spend an inordinate amount of energy on the question of whether one should embrace or disclaim the CISG, when in fact, for most points of possible contention, the parties to an international sales contract should be able to rely upon the CISG by contracting around the sections that have created the most litigation. By doing so, the residual default rules of the CISG should have little impact on the resolution of disputes, and therefore, the parties need not disclaim the CISG in favor of an otherwise applicable domestic law.

We know, at least in the United States, that parties routinely exclude the CISG,[2] or they will attempt to exclude the CISG, albeit unsuccessfully.[3] In this Article, I posit that parties need not disclaim the CISG to avoid the scope and interpretation problems inherent in the CISG. I suggest that parties be thoughtful about the effect of either choosing the CISG as governing law or having it apply by default and to appreciate some of the interpretive problems that might be hidden in this choice. If parties choose this path, they will benefit from the CISG by relying on law specifically crafted to effectuate the expectations of international sale of goods transactions.

The first part of this Article focuses on two structural problems in the CISG. The first problem is the determination of the scope of the CISG. As I will discuss, the ambiguity as to its own scope within the language of the CISG can cause uncertainty about the governing law of the agreement. The second problem is the lack of clear guidance and standards for the interpretation of the text of the CISG. Although I think both of these concerns are significant, these concerns can be easily remedied in a well-drafted agreement, and therefore they do not, in and of themselves, necessitate the exclusion of the CISG in favor of domestic law.

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[2] John F. Coyle, *The Role of the CISG in U.S. Contract Practice: An Empirical Study*, 38 U. PA. J. INT'L L. 195 (2016).

[3] *See, e.g.*, Travelers Property Cas. Co. of America v. Saint-Gobain, 474 F. Supp. 2d 1075, 1081 (D. Minn. 2007).

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The second part of this Article provides a checklist of the major parts of a transaction that, when there is a dispute, the default rules of the CISG have often not proven as adequate to provide clear guidance for resolution of the dispute. It is these areas that parties should consider drafting around.[4]

II. THE SCOPE OF THE CISG

A. The Ambiguous Scope of the CISG

The CISG is fairly well drafted, and at a superficial level is easily understood. But it actually does very little: "[t]his Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract."[5] It is the aspects of the transaction that the CISG does not cover that raises the first problem. The CISG does not cover many areas of sales law, such as pre-contractual liability, defects in consent, and the validity of terms. The CISG has no rules that govern the rights of third parties to the transactions. Questions about tort liability for the goods are avoided in the Convention. There are no rules on the law of agency, negotiable instruments, negotiable documents or letters of credit—the backbone of international commercial law. The CISG does not apply to certain types of goods,[6] mixed transactions where a preponderant part of the contract is not for the sale of goods,[7] as well as security interests in the goods. In addition, the CISG does not cover the conclusion of the sales contract through an agent, set-off, assignment of rights, limitation periods, and possibly the use of electronic communications.[8] Thus, a lot of what goes on in an international sale of goods agreement will be outside the scope of the CISG itself and governed by other law. This is what is generally referred to as "external gaps."[9]

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[4] CISG, S. Treaty Doc. No. 98-99, 1489 U.N.T.S 25567 (the CISG allows liberal disclaiming and modification of its rules).

[5] *Id.* art. 4.

[6] *Id.* art. 2.

[7] *Id.* art. 3(2).

[8] *See id.* art. 11 (because the CISG has no form requirements, the CISG, by its very terms, provides for electronic forms of contracting and communication).

[9] *See, e.g.*, Larry Dimatteo, *CISG as a Basis for a Comprehensive International Sales Law*, 58 VILL. L. REV. 691 (2013); PETER SCHLECTRIEM & INGEBOR SCHWENZER, COMMENTARY ON THE UN SALE OF

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This is not a minor issue. For example, although it is generally held that the validity of standard contract terms are governed by domestic law,[10] there is a split of authority as to whether they become part of the agreement as to be determined by the CISG[11] or domestic law.[12] Likewise, some courts have found that estoppel issues are not governed by the Convention,[13] where other courts have concluded that estoppel is a general principle of the Convention.[14] As with many other issues where there has been disagreement on the scope of the CISG, there is really no principled basis for choosing one view over the other.

B. The CISG's Interpretative Guidance to its Scope

The CISG gives some tentative guidance for the line between "internal gaps," matters covered by the CISG but not answered by it, and "external gaps," matters outside the scope of the CISG:

> Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on

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GOODS 132 (Ingebor Schwenzer ed., 4th ed. 2016); Amtgericht Sursee, Switzerland, 12 Sept. 2008, www.cisg-online.ch.

[10] *See* Landgericht Landshut, Germany, 12 June 2008, English translation, http://www.cisg.law.pace.edu/cisg/wais/db/cases2/080612g2.html; *see also* CLOUT case No. 428 [Oberster Gerichtshof, Austria, 7 Sept. 2000], Unilex; *see also* Rechtbank Zutphen, Netherlands, 29 May 1997, Nederlands Internationaal Privaatrecht, 1998, No. 110; *see also* Amtsgericht Nordhorn, Germany, 14 June 1994, Unilex.

[11] *See, e.g.*, Oberlandesgericht Linz, Austria, 23 Mar. 2005, English translation, http://www.cisg.law.pace.edu/cisg/wais/db/cases2/050323a3.html; CLOUT case No. 831 [Hoge Raad, the Netherlands, 28 Jan. 2005]; Oberlandesgericht Düsseldorf, Germany, 21 Apr. 2004, English translation, http://www.cisg.law.pace.edu/cisg/wais/db/cases2/040421g3.html; CLOUT case No. 592 [Oberlandesgericht Düsseldorf, Germany, 30 Jan. 2004]; CLOUT case No. 819 [Landgericht Trier, Germany, 8 Jan. 2004].

[12] *See, e.g.*, Rechtbank Arnhem, the Netherlands, 17 Mar. 2004 (stating that issue of the applicability of seller's standard terms and conditions is governed by gap-filling domestic law), English translation, http://www.cisg.law.pace.edu/cisg/wais/db/cases2/040317n1.html.

[13] *See, e.g.*, Caterpillar, Inc. v. Usinor Industeel, 305 F. Supp. 2d 659 (N.D. Ill. 2005); Arrondissementsrechtbank Amsterdam, Netherlands, 5 Oct. 1994, Nederlands Internationaal Privaatrecht, 1995, No. 231.

[14] *See, e.g.*, CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision); CLOUT case No. 94 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994]; CLOUT case No. 93 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994] (see full text of the decision); Hof's-Hertogenbosch, Netherlands, 26 Feb. 1992, Unilex.

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> which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.[15]

For those issues for which the CISG does not expressly provide for, there needs to be an initial inquiry whether the issue can be resolved on the basis of the "general principles" on which the Convention is based.[16] It is important to understand the reason for this. If there is an issue, although not "expressly settled" by the Convention, but still based on the "general principles" on which the CISG is based, then that issue is to be resolved by the "general principles" and not by the domestic law (or other international law) that would govern that issue under the rules of private international law.

Therefore, before determining the question of what law applies for external gaps, the question of what constitutes "general principles" must be resolved. There, of course, is nowhere near a consensus of what constitutes the "general principles" on which the CISG is based. A lengthy list of general principles can be compiled from commentary, court decisions, and arbitration awards; a list too long to attempt to provide here. The point is simple: there is uncertainty as to these "general principles."

Furthermore, the question of what constitutes the "general principles" on which the CISG is based is only the first question in the determination of what law applies in these gap areas. If there appears to be no general principle derived from the Convention, then a second analysis must be done under the forum's rules of private international law to determine what domestic or other international law might apply to these external gaps.

Therefore, to determine the scope of the CISG, there are two inquiries. First, one must ask, "what does the text of the CISG say?" Second, one must ask, "what are the 'general principles' on which the CISG is based?" Only then can one get to the third question of, "what law governs issues outside of the CISG—the 'external gaps'?" However, neither the line between the CISG and the "general principles" on which the CISG is based, nor what constitutes the "general principles" on which the CISG is based, has any certainty.

These two levels of uncertainty are compounded by the uncertainty of what constitutes the rules of private international law and how these rules would be applied. This latter question might be resolved somewhat by a choice of law clause. In either a standard form or bespoke agreement, it

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[15] CISG art. 7(2), Apr. 1, 1980, S. Treaty Doc. No. 98-99, 1489 U.N.T.S 25567.
[16] *Id.*

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therefore behooves parties to put in a choice of law term in the agreement to cover all aspects of the transaction to avoid the unnecessary uncertainty as to what the governing law will be other than the CISG.

This choice of law clause should resolve the problem of what other law applies, but it does not resolve the question of where the line is that divides the CISG from other law. In other words, is the CISG the text alone or is it the text as understood by the legions of interpretations that already exist? Furthermore, as I will discuss below, the application of private international law to resolve external gaps may not be fully clarified by a choice of law clause. This is the great onion of the CISG.

C. The Choice of the UNIDROIT Principles of International Commercial Contracts as an Example of Delineating the Scope of the General Principles of the CISG

To provide a concrete example of how fluid the determination of what are the "general principles" on which the CISG is based, we can examine how courts have interpreted CISG Article 7(2) in light of the UNIDROIT Principles of International Commercial Law.[17] This example is apt as there is disagreement whether the UNIDROIT Principles represent the "general principles" on which the CISG is based.[18]

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[17] The UNIDROIT Principle of International Commercial Contracts are designed to be an "elaboration of an international restatement of general principles of contract law." The International Institute for the Unification of Private Law [UNIDROIT], *Principles of International Commercial Contracts 2010*, at xxii, https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010. Originally promulgated in 1994, new sections were added, and some amendments made in 2004, 2010 and 2016. I have used the UNIDROIT Principles for this analysis solely as an example of another law that would blur the border between the CISG and other applicable law. This analysis is equally applicable if the other governing law were a domestic law that filled in the gap where the CISG did not apply.

[18] Hof van Cassatie, Belgium, 19 June 2009, English translation, http://www.cisg.law.pace.edu/cisg/wais/db/cases2/090619b1.html; Netherlands Arbitration Institute, the Netherlands, 10 Feb. 2005, http://www.cisg.law.pace.edu/cisg/wais/db/cases2/050210n1.html. Some commentators, *see, e.g.*, SCHLECHTRIEM & SCHWENZER, *supra* note 9, including myself assume that the UNIDROIT Principles would be better classified as external gap fillers, if for no other reason than the fact that the UNIDROIT Principles were drafted after the CISG, and therefore could not have been a source of general principles on which to base the CISG.

There is some logic, however, to concluding that the UNIDROIT Principles could be treated as a source of "general principles" and therefore become subsumed by the CISG itself. If one considers both the CISG and the UNIDROIT Principles as having been based on previously recognized principles of

In this analysis, I am assuming that the parties have not chosen to disclaim the CISG, but instead provide a choice of law provision providing for the UNIDROIT Principles to govern those issues in the transaction outside the scope of the CISG.[19] The benefits of this would appear to be evident: certainty is important, and probably more important than *which* law applies is *knowing which* law applies. A choice of law provision avoids the uncertainty of the application of private international law to those issues not governed by the CISG by providing for a specific law to govern those aspects of the transaction not governed by the CISG. This choice of law clause, however, might not actually achieve clarity as to the applicable law, nor, as I will discuss below, necessarily resolve some ambiguities in the resulting applicable default terms of the agreement.

Convenient for our analysis, UNIDROIT has drafted model clauses for use with the UNIDROIT Principles of International Commercial Contracts.[20] One model clause directly addresses the CISG and the UNIDROIT Principles operating simultaneously:

> This contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG) interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts.[21]

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international commercial law, then they are both derived from similar sources. As such, because the scope of the UNIDROIT is broader than the CISG, one might view the UNIDROIT Principles as simply a more encompassing articulation of the same general principles underlying both instruments, and therefore, for purposes of interpretation of the CISG, the UNIDROIT Principles are a source of the general principles underlying the CISG.

[19] I assume the parties have decided that they want the CISG to apply to their agreement. The fact the parties would choose to put in a choice of law clause to supplement the CISG suggests the conscious choice to keep the CISG as operative law. As a general matter this makes sense as the CISG works well across legal cultures and it has been well worn through the cases, arbitrations, and literature to have a fairly firm set of interpretations, so that for the purpose of understanding the provisions, one would not feel left out in the woods at night. Throughout this Article I assume that the choice of retaining the CISG as the law governing an international sale of goods contract often is a wise choice. The purpose of this Article is to examine areas within the CISG where parties may want to clarify its provisions to eliminate possible ambiguities as to rights and obligations.

[20] The International Institute for the Unification of Private Law [UNIDROIT], *Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts 2013*, https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses.

[21] *Id.* at 16. The question whether the UNIDROIT Principles are "law" within the meaning of that term for the purpose of an enforceable choice of law provision is beyond the scope of this Article. For the purpose of this analysis, I assume the Principles are "law."

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This model choice of law clause is intended to provide certainty to those contractual questions from the transaction that are outside the scope of the CISG,[22] and this model choice of law clause was specifically drafted to accommodate Article 7(2) of the CISG.[23] Thus, with the use of this choice of law clause, the Principles should only apply to fill in the gaps left by the CISG. Yet, there are analytical complexities hidden in the use of this form model clause designed specifically for a choice of law in addition to the CISG.

If one assumes that the UNIDROIT Principles are not the "general principles" on which the CISG relies, then one must first determine what the scope of the CISG is, in order to determine at what point the UNIDROIT Principles can serve to supplement the CISG. This depends on whether one determines the CISG is the black-letter text alone or whether the CISG is the black-letter text as understood and supplemented by the legions of interpretations that already exist to define the general principles on which it is based. As those lines are inconsistent among the cases and commentary, it is not clear how one is to pick and choose among the differing views.

If one assumes the UNIDROIT Principles are the "general principles" on which the CISG is based, in order to determine at what point the text of CISG itself ends and the "general principles" become operative, a determination has to be made as to what the text of the CISG encompasses. One must ask, "is this the black-letter text alone or is it the black-letter text as understood and supplemented by the case law interpreting the CISG?" The line between supplementing and interpreting the CISG under Articles 7(2) and 7(1) quickly blurs.[24] Thus the line between using the UNIDROIT Principles to supplement or interpret the CISG is difficult to delineate.

This gets complicated. Does a text have to be interpreted to determine the exact boundaries of it for the purpose of determining whether another text should be consulted to interpret the initial text?

This whole issue is much too subtle and nuanced to realistically expect any attorney, judge or arbitrator to feel confident in her ability to resolve it. I do not mean to suggest that a choice of law provision does not serve an important function or is not necessary. I only suggest that a choice of law

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[22] *Id.*
[23] *Id.* at 18.
[24] *See, e.g.*, SCHLECHTRIEM & SCHWENZER, *supra* note 9.

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clause alone will not resolve the interpretative ambiguity built into the CISG as to what constitutes the "general principles" on which the CISG is based.[25]

III. INTERPRETING THE CISG

Determining the scope of the CISG is only part of the exercise in delineating the meaning of the CISG. The other part is how to interpret the text of the Convention itself

A. The CISG is Mostly Default Rules

The CISG, like most sales or commercial codes, primarily provides default rules for those terms that parties do not have a need to negotiate or modify. These default rules serve an important function in commercial law; default terms minimize transaction costs by allowing parties to contract without having to negotiate individual contracts. As to the utility of default terms in individual contracts, we can roughly divide up sales contracts into three archetypes.

First, there is the non-negotiated, non-form agreement that makes up the bulk of day-to-day contracting. This is the bread and butter of default contract rules that are provided by, for example, Article 2 of the Uniform Commercial Code.[26] These default rules provide broad and comprehensive background rules to allow people to shop at the supermarket without having to negotiate the terms and conditions of a contract to purchase a bunch of bananas and some cat food. With the rapid development of e-commerce internationally, there has been a corresponding rise in the number of fairly routine international sales agreements that neither need nor rely on form agreements or fully negotiated contracts. The default provisions of the CISG provide a convenient legal background for the common factual issues of performance and remedies that comprise the bulk of disputes among these transactions.

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[25] Addressing this very question, Professor John Honnold suggested that these close questions should be resolved in favor of applying the Convention. JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 60.4 (2d ed. 1991). This, however, seems more aspirational than realistic, and if nothing else, his solution highlights the problem.

[26] U.C.C. § 2 (AM. LAW INST. & UNIF. LAW COMM'N 2012).

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Parties that enter into an international sales agreement governed by the CISG with neither a standard form on either side nor a negotiated agreement are operating on blind faith that some law will govern their transaction. These parties assume the risk that goes with any contract governed almost solely by default terms. The CISG is, of course, designed for such a transaction. But to provide for this result, the CISG necessarily must provide the most general and generic rules.[27]

The second type of contract is the standard form contract that is intended to be used for multiple repeat transactions. These would include both the one-party form agreements as well as the multiform battle of the forms among commercial parties.

The third type of contract is the negotiated agreements in which both parties participate in developing and agreeing upon the terms. It is the second type of agreement as well as the third type of agreement where the reliance of the default rules of the CISG raise significant issues. The latter two types of agreements, agreements in which the parties consciously choose whether to have the CISG govern their transaction, are the focus of this Article.

B. Interpreting the CISG: Article 7(1)

To fully understand the CISG, once the scope of the CISG have been determined, there is also the need to interpret the meaning of the CISG itself. As guidance, CISG Article 7(1) sets forth two interpretative guidelines. First, CISG Article 7(1) provides for the autonomous interpretation of the CISG. Second, CISG Article 7(1) also mandates the uniformity of the application of the CISG.

"Autonomous interpretation" of the Convention means that the Convention should be interpreted in light of other cases and arbitral decisions that have interpreted the CISG.[28] In other words, the Convention should not be interpreted by using domestic law; instead, interpretation should be self-referential. The purpose is to provide a consistent body of interpretations that

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[27] This is the case with any law that governs contracts for the sale of goods. Although the CISG may differ in important ways from an otherwise applicable domestic law, parties who are oblivious to or not concerned with the law that governs their transaction are not in a position to complain later about how this law handles their agreement. This Article focuses on those transactions where parties consciously choose whether to have the CISG govern their transaction.

[28] HENRY DEEB GABRIEL, CONTRACTS FOR THE SALE OF GOODS: A COMPARISON OF U.S. AND INTERNATIONAL LAW 61 (2d ed. 2009).

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create a uniform understanding of the CISG based on its intended application to international commercial transactions.

Whether "autonomous interpretation" is practically achievable can be best understood by the relationship of "autonomous interpretation" with its parallel mandate for the uniformity of interpretation. The autonomous body of cases that interpret the CISG should be the basis for a uniformity of interpretation. Questions of interpretation should be resolved from this limited body of material and not be subject to interpretations based on law outside the CISG. This ideally should create an *ex ante* understanding of how the Convention will universally be understood, thereby providing international parties with some level of certainty of the meaning of the Convention.

This goal of uniformity of interpretation makes sense both theoretically and practically. An international instrument designed for international use should be easily understood in a uniform manner irrespective of the location of the parties. But this goal was never realistic. With currently ninety-two countries as parties to the CISG;[29] parties that represent myriad legal systems, the inconsistencies of interpretation are legion. In other words, the autonomous body of CISG case law is anything other than uniform. Thus, not surprisingly, some courts have specifically noted that foreign opinions are merely persuasive and not binding.[30] This appears to be less necessary as an issue of jurisprudence and more an issue of prudence. This is the only way a court can make its way through the maze of inconsistent cases.

This problem should not be overstated. It is not insurmountable. But it does appear to be more of a problem than one would likely encounter in any domestic law. The interpretation of local law would entail neither sifting through cases that may be from other legal systems nor cases in other languages.

The appropriate response to this problem is not necessarily to exclude the CISG and fall back on domestic law. Under domestic law, the problem

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[29] *United Nations Treaty Collection*, TREATIES.UN.ORG, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en (last visited Feb. 22, 2019).

[30] Chicago Prime Packers, Inc. v. Northam Food Trading Co. et al., 320 F. Supp. 2d 702 (N.D. Ill. 2004); Tribunale di Padova, Italy, 25 Feb. 2004, English translation, http://www.cisg.law.pace.edu/cisg/wais/db/cases2/040225i3.html; Trib. di Rimini, 26 Nov. 2002, Giur. it. 2003, I, 896, 3095 (It.), http://cisgw3.law.pace.edu/cases/021126i3.html; Trib. di Vigevano, 12 July 2000, Giur. it. 2000, 280-90 (It.), http://cisgw3.law.pace.edu/cases/000712i3.html; Trib. di Pavia, 29 Dec. 1999, Giur. it. 2000, 932-33 (It.), http://cisgw3.law.pace.edu/cases/991229i3.html.

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may be lessened, but it may still exist. As I will suggest, the problem is not the CISG *per se*, but the reliance on certain default rules within the CISG that can lead to uncertain results. This can be illustrated by examples.

C. A Problematic Default Rule: CISG Article 39 Time of Notice

To give some context to this discussion, I would like to explore CISG Article 39(1), which is an example of a default rule in the CISG that is a constant source of unnecessary litigation regarding the CISG.[31] Article 39 provides an affirmative obligation for the buyer to give the seller notice of a lack of conformity of the goods within a reasonable time. Failure to meet this requirement can have serious consequences,[32] so this requirement must be taken seriously.

This notice requirement raises two substantial factual questions that can only be articulated but not answered by the CISG. The first question is, "what constitutes a reasonable time to give notice?" The second question is, "what constitutes adequate notice?"

As for what is a reasonable time for notice, there is no realistic way to provide a single time for what would be reasonable under all circumstances because both the nature of the goods as well as the reasonable expectations of the buyer and seller require that this be resolved on a case-by-case basis. Since the question of timing is a factual one, it might be thought that the whole question should focus on the facts of the individual case, and therefore case law and arbitrations would have little to add to the specifics of the case at hand. Yet, this is not how the CISG has been understood. There is a myriad of cases upon which parties routinely rely to resolve this question.

Moreover, a large body of case law has developed that provides for presumptive notice, specific time periods as guidelines or default rules.[33] This is contrary to intentional flexibility provided in the language of Article

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[31] CISG art. 39(1) provides: "The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it." CISG art. 39(1), Apr. 11, 1980, 1489 U.N.T.S. 3, 66.

[32] If the buyer does not provide the seller this required notice, the buyer will have to pay the contract price and not reduce the price by the value of the non-conformity.

[33] UNCITRAL, 2016 DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 3, art. 39 at 177.

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39. Yet, with the mandate of autonomous interpretation in CISG Article 7, one cannot be certain that these cases may not be relied upon to one's detriment.

As with the question of the timing of notification, CISG Article 39 also leaves open the means by which notice is to be given. The method of notification is properly and necessarily left to the facts of the individual case.[34] Yet, as with the question of the time of notification, the issue of the proper means of notice has generated a significant number of disputes.[35]

Might these questions of timing and method of notice be avoided by falling back on domestic law? Possibly, but this is not likely to have a significant effect. Thus, there are similar notice requirements in the Uniform Commercial Code, for example. As with the CISG, in the Uniform Commercial Code, what constitutes both the reasonable time and method for notification is fact specific to the individual case.[36] As we have seen though, some interpretations of the CISG provide for a presumptive notice period, which is a concept foreign to the Uniform Commercial Code. This makes what might be seen as a straightforward question of fact to an American lawyer now subject to legal conclusions beyond the simple fact determination of reasonableness, and therefore subject to greater uncertainty.

But whether there really is more uncertainty and therefore more fear in the use of the CISG as there would be under domestic law, the uncertainty in both legal regimes can easily be addressed by adding to the agreement a term that specifies the time and manner of the notification of default. If this term is provided, as to the question of notification of default, there is essentially no difference between the CISG and the Uniform Commercial Code (or presumably any other domestic law) and therefore there is no need to worry about the uncertainty of the CISG for this issue.

IV. CONTRACTING AROUND DEFAULT RULES

As the discussion on Article 39 shows, a party should easily be able to contract around a default rule that creates potential uncertainty. But is it reasonable to expect parties to contract around all of the uncertainties in the CISG? The answer is no. I would like to suggest that to do so is not necessary,

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[34] *Id.* at 176–77.
[35] *Id.*
[36] *See* U.C.C. § 2-607(3)(a) (AM. LAW INST. & UNIF. LAW COMM'N 2012).

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and the failure to do so is not, in and of itself, a reason to contract out of the CISG.

A lawyer assisting in the agreement would consider whether the agreement should include clauses on choice of courts, choice of law, and arbitration. It is worthwhile to consider other terms in the agreement that may mitigate the need to worry about other aspects of the CISG.

It should be noted that the majority of disputes among parties to international sales agreements are on the factual question of performance and remedies. For these disputes, the underlying legal rules that govern the transaction will have little bearing on the result of the dispute under most legal systems including the CISG.

The resolution of factual disputes always entails a certain level of uncertainty, as that is the nature of dispute resolution. However, it is not these factual uncertainties that concern us. We are concerned only with those default rules that gauge the standard with which to measure a party's obligations and that do not give clear guidance that create uncertainty as a legal question.

In a contract for the international sale of goods, normally the major terms the contracting parties care about are price, standards for performance, and remedies.[37] If the terms for the standards for performance and the remedies for non-performance are expressly set out, the underlying substantive law will, to a large extent, have little if any impact on the obligations and performance.

The list of articles in the CISG that have been the greatest source of litigation is not too extensive. The following is a brief overview of those contentious areas.

A. The Goods

Failure of the parties to agree upon the goods to be sold is not an ambiguous or undefined term, but a failure of assent.[38] In this case, there is no contract, and therefore no reason to be concerned with what law governs the non-existent contract.

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[37] These are terms that, if the parties do not provide for expressly, the terms will be governed by the default terms in the underlying law.

[38] *See, e.g.*, SCHLECHTRIEM & SCHWENZER, *supra* note 9, at 247.

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B. The Price

Price is a term, the absence of which, should not necessarily result in a failure of assent in a contract governed by the CISG.[39] There is, however, some authority for this result. Thus, under the CISG, absent a price term, there is either not a contract or a factual issue about the reasonable price of the goods under comparable circumstances.[40]

A reasonable price, if it is a question that is in dispute, is not one the parties have agreed upon, for if they had there would not be a dispute. The absence of a price term could arise either inadvertently or consciously.[41] In either case, the result might either be a failure of assent or litigation over the question of a "reasonable price," and such a result might not reflect the bargain that the parties might otherwise have or would have wanted. This potential problem is easily resolved by having a definite price term.[42]

C. Title

The CISG expressly excludes questions of property rights and title.[43] Title, though, may be important to the transaction. Title may affect the rights of the creditors of both the buyer and seller. Title to the goods may be particularly important when the transaction includes secured financing of the goods either by the seller or a third party. The transfer of title may be expressly provided for in the agreement or the parties may rely on a choice

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[39] CISG art. 55 provides a rule to determine price when the parties have contracted without a price term:

> Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

CISG, *supra* note 4, art. 55, at 69.

[40] For citations and discussion of the cases that have found a price term to be mandatory, see UNCITRAL, 2016 DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 2, art. 14 at 87.

[41] This could happen, for example, when the parties assumed the price would be set later, either by the parties themselves or a third party.

[42] I assume a definite price includes a definite means of determining a price later. Expressly providing a means to determine the price in the future is valid under both the CISG and the U.C.C. *See* CISG, *supra* note 1, art. 55 at 69, and U.C.C. § 2-305 (AM. LAW INST. & UNIF. LAW COMM'N 2012).

[43] CISG, *supra* note 1, art. 4(b) at 60.

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of law clause that governs issues outside of the CISG. Either way, it is important to align the transfer of title to the relevant requirements of the applicable law of secured transactions if a security right is taken in the goods.

For parties that routinely rely on domestic law, the issue of title might not be an issue routinely addressed in the sales agreement as the transfer of title may be embedded in the domestic law.[44] It is perilous not to provide for the issue of title in a transaction governed by the CISG.

D. Formation

Formation is rarely an issue in a contract dispute. Once performance has begun, most disputes about the existence of the contract are moot. Moreover, most disagreements arising under the CISG are based on either the quality or the absence of performance or on the appropriate remedy upon default. Yet, formation issues can arise. These can easily be addressed to avoid potential problems.

Agreements should be in writing or by an electronic substitute. Although the CISG has no form requirements,[45] writings or the electronic equivalents provide evidence of the existence of offers, acceptances, agreements, and the terms of the agreement. Relying on an oral agreement for an international contract for the sale of goods invites disputes on both the existence as well as the terms of a contract.

The CISG provides clear legal guidance on contract formation. This includes rules on the effectiveness of offers,[46] acceptances,[47] revocations[48] and rejections,[49] and counter-offers.[50] These rules, though, assume that the facts and timing of dispatch and receipt will be clearly identifiable. This may not be the case, particularly with the use of electronic communications. This potential problem is easily avoided by clearly specifying in an offer the method and timing for when acceptance occurs.

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[44] This would certainly be the case in American law. U.C.C. § 2-106(1) (AM. LAW INST. & UNIF. LAW COMM'N 2012).

[45] CISG, *supra* note 1, art. 11 at 61.

[46] *Id.* art. 15.

[47] *Id.* art. 18.

[48] *Id.* art. 16.

[49] *Id.* art. 17.

[50] *Id.* art. 19.

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The CISG also allows for contract formation by conduct.[51] But such an agreement runs the risk of leaving a number of terms undecided, and therefore, subject to the default provisions of the CISG, that may not necessarily reflect the parties' true intent.[52] The agreement should specify the means by which the agreement is to be accepted and not leave this open to acceptance by performance.

E. Fundamental Breach and Other Grounds for Refusing Goods

The CISG provides that:

> A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.[53]

A fundamental breach gives the non-breaching party the right to avoid the contract and suspend its own obligation to perform.[54] A breach that is not fundamental still allows the non-breaching party the right to damages, but that party's obligation to render its own performance is not suspended.[55]

As a default rule, "fundamental breach" raises two questions of concern to contracting parties. First, what constitutes a "fundamental breach?" Second, does the standard for a fundamental breach reflect the standard of performance the parties would choose for the suspension of their contractual obligations?

As for the meaning of "fundamental breach," although the CISG is intended to be interpreted autonomously, many decisions have relied on domestic statutes and cases to determine its meaning.[56] Moreover, even those decisions that have consciously attempted to stay within the framework of "autonomously interpreting" the language of CISG Article 25 have often found the general language of the section vague enough to prevent any clear

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[51] *Id.* art. 14(1), 18(1).

[52] This issue often arises when there is a battle of the forms.

[53] CISG, *supra* note 1, art. 25 at 3.

[54] A non-fundamental breach allows the non-breaching party the right to damages for the breach, but does not allow the non-breaching party to suspect its performance.

[55] *See, e.g.*, SCHLECHTRIEM & SCHWENZER, *supra* note 9, at 420.

[56] *Id.* at 423.

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guidance. This has resulted in disparate interpretations, such that even the question of whether late delivery might constitute a fundamental breach is unclear.[57] Reliance on the cases, then, may not shed much light on how this Article will be understood under a specific set of facts.

As to whether a "fundamental breach" is the standard that actually reflects the expectation and desires of the parties to allow the suspension of performance, that is another question that the parties should resolve. The default standard of the CISG is not universal. For example, under American domestic law, the default standards to allow the buyer to suspend performance is any deviation of the goods from the contract specifications.[58] Both of these standards, although different, purport to reflect the normal expectation of buyers. This suggests that neither default standard is likely to truly comport with the expectations of many contracting parties.

Both the potential ambiguity of the meaning of fundamental breach, as well as the possibility that it does not represent the parties' desire for the standard for termination, suggests that the standard of "fundamental breach" may not reflect the bargain the parties would intend. To avoid these problems, parties should provide an express standard for the right to suspend performance.[59]

F. Implied Obligations

The CISG provides for implied seller obligations:

> *(a)* Are fit for the purposes for which goods of the same description would ordinarily be used;
>
> *(b)* Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement.[60]

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[57] For a discussion of cases providing contrary authority, see UNITED NATIONS COMM'N ON INT'L TRADE LAW, DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 114–17 (2016 Edition).

[58] U.C.C. § 2-601 (AM. LAW INST. & UNIF. LAW COMM'N 2002).

[59] Because a party declaring a fundamental breach must give the other party notice of this declaration, it is wise to resolve the factual questions of what form, content and timing is necessary for meeting the notice requirement. *See* CISG, *supra* note 1, art. 26.

[60] CISG, *supra* note 1, art. 35.

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These implied obligations raise two potential concerns for contracting parties, one interpretative and one factual.

First, these obligations have not been given a consistent legal meaning. These implied obligations are similar to those contained in some domestic laws,[61] and contrary to the concept of autonomous interpretation, it is not uncommon for some courts to view the CISG through the lens of domestic law.[62] This creates some uncertainty as to the legal meaning of these obligations, as the cases interpreting these obligations do not create an autonomous view of the implied obligations under the CISG, but create a pastiche of various domestic codes and cases that address the scope of implied obligations under local law.[63]

Second, it is also unclear what "fit for the ordinary purpose" will mean factually in any specific case. Thus, not only the question of what is an "ordinary purpose" may be disputed, but how long goods should function under this standard, is also subject to dispute.

To avoid both the ambiguities of the language of these obligations, as well as the factual application of the requirement that goods are "fit for the ordinary purpose," sellers might be advised to expressly disclaim these obligations and replace the seller's obligations with express statements of quality and performance.

G. Express Obligations

Thus far, I have emphasized the danger of relying on the default terms of the CISG. Many of these problems can be ameliorated by express terms. There are, however, several persistent problems that arise with express obligation terms that might be clarified in the agreement.

It is common for agreements to provide for the goods to meet certain externally determined standards, such as safety, health and quality. With international sales agreements, it is not uncommon for these standards to vary

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[61] *See, e.g.*, U.C.C. § 2-314 ((AM. LAW INST. & UNIF. LAW COMM'N 2012) (American Law); Sale of Goods Act 1895 (W. Austl.), article 14 (Austl.) (Australian Law).

[62] For a discussion of cases relying on domestic law, see UNITED NATIONS COMM'N ON INT'L TRADE LAW, *supra* note 57, at 141–42. That at least some courts have difficulty distinguishing the implied obligations from their domestic law is exemplified by the tendency of some courts to use domestic terminology.

[63] *Id.*

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among countries.[64] Parties should clarify which domestic or international standards govern.

The CISG does not address the question of which party bears the burden of proving non-conformity.[65] The decisions have not been unified on whether this is a question of domestic law or whether this is a question to be determined within the CISG itself. Even among those cases that have found that this issue is within the scope of the CISG itself, there is not uniformity. The agreement can specify this respective obligation.

H. The Meaning of Terms in the Agreement

The CISG provides a rule for the interpretation of the terms in the agreement:

Article 8

> (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
>
> (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
>
> (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.[66]

This Article provides a broad rule for the interpretation of the terms of the agreement. Despite some contrary authority,[67] Article 8 does not provide for the application of the common law parol evidence rule to exclude evidence as to the meaning of the terms in the final written or electronic agreement.[68] There is nothing in the CISG, however, that prevents the enforceability of a merger clause to exclude evidence of additional terms to

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[64] *Id.*

[65] *Id.* at 143–44.

[66] CISG, *supra* note 1, art. 8.

[67] *See, e.g.*, Beijing Metals & Minerals Imp./Exp. Corp. v. Am. Bus. Ctr., Inc., 993 F.2d 1178 (5th Cir. 1993).

[68] GABRIEL, *supra* note 28, at 70.

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the agreement, and parties are advised to take advantage of this possibility to avoid claims of additional terms that were not included in the formal agreement.

I. Payment

There are three issues regarding payment that are relevant but unanswered in the CISG: the method of payment, the currency of payment, and interest.

1. Method of Payment

The CISG provides the obligation to pay; it does not provide the method for payment.[69] Payments in international sales transactions vary from the traditional bill of exchange to more modern electronic payments such as wire transfers. Payment against documents of title are still a common means of payment for goods sold internationally. Letters of credit are widely used to shift the risk of payment from the buyer to a bank. Issues of currency controls may be relevant.

If the parties do not expressly provide for the method of payment, and a method cannot be ascertained by CISG Articles 8 or 9, then the CISG provides no answer for the method of payment, and it would be determined under the applicable domestic rule determined by private international law or other law designated by a choice of law clause. These issues on the method of payment can easily be resolved by a term in the agreement.

[69] The CISG does provide default rules to the time and place of payment. *See* CISG *supra* note 4, arts. 57, 58.

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2. Currency

In a domestic transaction, the currency is usually assumed to be the domestic currency. No such assumption can be made in an international sale. The failure of the parties to specify the currency of payment may lead to an unnecessary dispute, particularly when there are fluctuating exchange rates. The cases are not consistent on whether the question is one that is answered by the CISG or by the otherwise applicable domestic law.[70] Neither approach is particularly straightforward.

If it is determined that the question is one of domestic law, absent a choice of law clause that governs issues outside of the CISG, the analysis will inevitably result in having to apply the rules of private international law.[71] This will result in a presumption under local law that may not reflect the expectations of both parties.

The cases that have determined that currency is an issue that can be determined from the CISG itself have done so inconsistently, often finding that the currency should be based on the place of the seller's place of business[72] or the place where the goods are to be delivered.[73] It should be obvious that neither the place of the seller's business nor the place where the goods are to be delivered necessarily reflects what expectations one could assume the parties would have for the currency of payment. To avoid a dispute on this easily resolved issue, the currency of payment should be specified in the agreement.

3. Interest

The CISG provides that, "[i]f a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it."[74] The rate of interest, however, is not provided for in the CISG because no rate could

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[70] UNCITRAL, *supra* note 33, at 257.

[71] Once a domestic law is determined, it is common for domestic laws to provide for payment in the currency of the place of the seller's business. *See Italy v. Switzerland*, No. C1 06 95, CLOUT, Apr. 27, 2007, http://cisgw3.law.pace.edu/cases/070427s1.html.

[72] UNCITRAL, *supra* note 33, at 257.

[73] *Id.*

[74] *See* CISG, *supra* note 4, art. 78.

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be agreed upon during the negotiations leading up to its adoption.[75] Some cases have determined that the rate is to be determined by the applicable domestic law that is applicable under the rules of private international law,[76] others by the law of the jurisdiction of the creditor,[77] and others by the law of the jurisdiction of the currency of payment.[78] The interest rate should be expressly provided for in the agreement.

J. Remedies

As with other legal regimes, the remedial structure in the CISG provides general rules, and as such, it may not reflect the desires or expectations of the parties. The parties may approach this by contractually providing the remedial structure that fits the transaction. The remedies that have been the most contentious and therefore might be considered for contractual clarification and modification are specific performance, consequential damages, and limited remedies.

1. Specific Performance

The CISG provides for specific performance as a default remedy.[79] To assuage the common law contingency among the drafters, the CISG also provides that a court that would not otherwise enforce an award of specific performance under its domestic law, need not do so under the CISG.[80]

There has been little litigation, though, under either of these Articles.[81] This is due, to a large extent, to the difficulty in obtaining and enforcing the right. Buyers often find it more advantageous to get replacement goods if possible and then pursue a remedy of damages. This is particularly true when the buyer needs the goods quickly.

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[75] *See* SCHLECHTRIEM & SCHWENZER, *supra* note 9, at 1111–12.
[76] UNCITRAL, *supra* note 33, at 365.
[77] *Id.*
[78] *Id.*; *see also* Volker Behr, *Symposium—Ten Years of the United Nations Sales Convention: The Sales Convention in Europe: From Problems in Drafting to Problems in Practice*, 17 J.L. & COM. 263 (1998).
[79] CISG, *supra* note 4, art. 46(1).
[80] CISG, *supra* note 4, art. 28.
[81] *See* CLOUT re: 46(1) and 28.

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The award of specific performance usually requires a two-step process. First, there needs to be a judgment or arbitral award. Second, this judgment or award must be enforced. These two steps may be in different jurisdictions. The legal process necessary to enforce an award of specific performance, depending on the jurisdiction or jurisdictions, may be lengthy and procedurally complicated.

If the jurisdiction that is likely to be the forum is a common law jurisdiction, the buyer may have some difficulty even getting an award for specific performance. This might possibly be mitigated by a clause in the agreement specifically providing for specific performance, and common law courts have become more inured to awarding specific performance when the parties allocate that risk in the agreement.[82] Yet, there is still some reluctance by common law courts to award specific performance. For these reasons, specific performance as a remedy will often require some very exacting contracting for the choice of forum and an expedited means of enforcement to provide for the most expedient means to achieve this result.

The difficulties in getting specific performance are not limited to the CISG. The difficulties exist regardless of the governing law because of the procedures necessary to get this remedy. To the extent the buyer may need the remedy of specific performance, having the CISG as the governing law will likely neither help nor hinder. This is still an issue that parties may consider providing for in the agreement to allow an expedited means for specific performance.

2. Consequential Damages and the Limitation of Remedies

The inclusive right to damages in the CISG is packed into one Article:

> Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.[83]

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[82] *See, e.g.*, GABRIEL, *supra* note 28, at 170.
[83] CISG, *supra* note 4, art. 74.

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Within this Article, courts have found, among the types of damages, the right to consequential damages,[84] lost profits,[85] losses arising from the change in the value of money,[86] losses from death and personal injury,[87] and attorney's fees.[88] In addition to the losses incurred because of the diminished value of the goods themselves, this potential list encompasses a wide array of damages that might be well beyond the risk that the parties may be willing to or have assume to have undertaken in the agreement.

This default provision, however, as with comparable domestic laws, does not necessarily reflect the risk the parties are willing to assume in the agreement. For example, although consequential economic damages, such as lost profits, is the default position of the CISG, these damages are commonly excluded damages in sales agreements. It is also common for the seller to limit remedies further by providing a limited remedy such as repair or replace. Among the most important terms in the agreement are the terms that lay out the remedial structure of the agreement. As with much of the CISG, parties can avoid the uncertainties in the interpretation of and obligations created by the default remedial provisions by expressly providing for the remedies when there is a default.

K. Dispute Resolution

The potential unknowns when there is a dispute are too great to list in this Article. With an international contract for the sale of goods governed by the CISG, generally the unknowns are what court, what law other than the CISG, and what method of dispute resolution will prevail. A choice of law and choice of court or arbitration clause should eliminate these uncertainties.[89]

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[84] UNCITRAL, *supra* note 33, at 335.
[85] This is, of course, expressly provided for in article 74. CISG, *supra* note 4, art. 74.
[86] UNCITRAL, *supra* note 33, at 335.
[87] *Id.*
[88] *Id.* at 336.
[89] Under some legal systems, there are limits to both the ability to choose a court or a specific law. I assume any party that would take the advice I have given so far in this Article would understand and adjust for these risks. Tort liability and non-privity obligations, as well as other mandatory obligations probably cannot be disclaimed or modified by contract or be contracted around, and to the extent that they cannot, the choice of law governing the sales contract will neither help nor hinder the parties regarding these obligations.

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V. CONCLUSION

Although parties should recognize what substantive law governs their agreement, the significance of this choice is likely to be minor if the parties reflect in the agreement how they would resolve those issues that are likely to arise in a dispute. If, as I suggest, parties should provide express resolution of these issues, one might ask why the parties should otherwise rely on the CISG as the underlying sales law for those issues to which the parties do not provide. In other words, why should parties not simply opt out of the CISG and rely on a domestic law? The answer to this, I believe, goes to the very nature and purpose of the CISG. The CISG may be porous in its scope and rules of interpretation, but the CISG does serve two important functions that should not be easily dismissed. First, the CISG is based on the expectations of parties to international transactions; an expectation not built into any domestic law. Second, the use of the CISG does not require a party to understand the counterparty's domestic law. One may have to learn the CISG, but that is an equal burden upon both parties that favors neither. Thoughtful parties need not opt out of the CISG.

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